

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
JUAN JOSE MELENDEZ**

Petitioner

(Failed to Appear)

Elba Benitez

Housing Code Inspector
Department of Housing and
Community Affairs

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* Board of Appeals No. S-2786
* (OZAH No. 11-11)
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Report and Recommendation by: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE AND SUMMARY OF EVIDENCE

In Petition No. S-2786, Juan Jose Melendez, seeks approval of a Special Exception under Zoning Ordinance §59-G-2.00 to allow an accessory apartment on property located at 3937 Isbell Street, Silver Spring, Maryland. The legal description of the property is Lot 19, Block Y, in the Connecticut Avenue Park Subdivision.

On November 2, 2010, the Board issued a notice of a public hearing before the Hearing Examiner for February 10, 2011. Ex. 11(b). M-NCPPC Technical Staff and Ms. Elba Benitez, Housing Inspector, Department of Housing and Community Affairs (DHCA) had difficulty reaching the applicant to inspect the property. On February 3, 2011, the Housing Inspector informed the Hearing Examiner that she had done a preliminary inspection of the property, but needed to perform a follow-up inspection and the applicant “has not returned my call and I have not [been] [sic] able to reinspect the property...”. Exhibit 12. On February 4, 2011, Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), in its report dated February 4, 2011 (Exhibit 12(a)), recommended approval of the Petition, with four (4) conditions. These conditions included the following:

- 1) Per §59-G-2.00(b)(1) of the Montgomery County Zoning Ordinance, the applicant must occupy one of the dwelling units on the lot on which the accessory apartment is located.

- 2) Per §59-G-2.00(b)(3) of the Montgomery County Zoning Ordinance, the applicant must not receive compensation for the occupancy of more than one dwelling unit.

* * *

- 4) The applicant must adhere to the recommendations of the Department of Housing and Community Affairs.

The Housing Code Inspector from the Department of Housing and Community Affairs (DHCA) was able to inspect the property on February 7, 2011 and summarized her findings in a report dated February 8, 2011. That report noted the following issues with the proposed accessory apartment:

1. Two sets of measurements were used to determine the subordination of the accessory apartment to the main house. The footprints of the main house and accessory unit both measure approximately 998 square feet. The habitable space of the main

house measures 585 square feet while the habitable square space in the accessory unit measures 446. Based on the habitable square footage calculations, the accessory apartment IS subordinate to the main dwelling.

2. Based on the square footage of approximately 446 square feet of habitable space, the accessory apartment may be occupied by two (2) unrelated persons or a family not to exceed three (3) persons.
3. Off street parking is limited to (3) cars parked end to end.
4. The room used for storage can not be used as habitable space and may not be occupied due to lack of emergency egress.
5. The owner is renting out two rooms on the main floor.
6. The bulkheads in the accessory unit do not meet code standards for minimum ceiling height requirements and must be reduced so as not to exceed 6" from ceiling height.
7. The cellar accessory unit is overcrowded. The inspection showed at least 5 occupants.
8. Install globe to bathroom light fixture in accessory unit.
9. Install cabinet door to kitchen cabinet accessory unit.
10. Remove dead tree in rear of property.

The hearing went forward as scheduled on February 10, 2011. The Petitioner, Juan Jose Melendez, failed to appear at the hearing. The Housing Inspector, Ms. Benitez, did appear and presented testimony that neither the existing physical conditions on the property nor the existing use met the requirements of the Montgomery County Housing Code. Ms. Benitez testified she conducted a preliminary inspection of the property on February 7, 2011.

Ms. Benitez testified that during her preliminary inspection, she observed a bed in the area marked "storage" or "Room 3" on the Floor Plan. This area may not be used for habitable space due to lack of adequate emergency access. T. 5. She also testified that the Petitioner rents out two rooms on the main floor to a total of three tenants. In addition, the

Petitioner and his wife also live on the main floor. Her inspection showed that at least five occupants are living in the accessory apartment and it is overcrowded. T. 5. Repairs required to comply with the Housing Code included installing a globe to the bathroom light fixture, installing a cabinet door on the kitchen cabinet, reducing the size of the bulkhead in the ceiling in order to meet minimum ceiling heights, and removing a dead tree in the rear of the property. T. 5.

Ms. Benitez submitted photographs of the accessory unit into the record of the hearing. These photographs depicted a missing door on the kitchen cabinet, the bulkhead, the bed located in Room 3, and the egress window in Room 3. T. 7-11. She stated that the egress window in Room 3 didn't meet Code standards because the window was 63 inches from the floor and is only approximately 16 inches wide and 13 inches high. T. 10.

Finally, Ms. Benitez testified that on her second inspection on February 8, 2011, the bed in Room 3 had been removed. All other conditions remained the same.

The record of the case was held open until February 17, 2011. On February 17, 2011, the Hearing Examiner sent a letter to the Petitioner by certified mail, return receipt requested, stating that she would be willing to re-open the record in order to receive additional evidence that Petitioner intended to comply with the conditions set forth in the Technical Staff Report and the Housing Inspector's Report. Exhibit 15. On February 23, 2011, the receipt was returned to this office unsigned. Exhibit 15.

For the reasons set forth below, the Hearing Examiner recommends denial of the Special Exception petition because there is no evidence in the record that the physical condition of the subject property satisfies the requirements of the Housing Code. Nor is there

evidence that the use of the property complies or will comply with the requirements of either the Housing Code or the Zoning Ordinance.

II. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, which are usually analyzed seriatim to determine whether a petition has met those standards.

This report does not contain the usual statement of facts and section by section analysis because Petitioner failed to provide sufficient evidence that the repairs required by DHCA will be made or that the use will conform to the requirements of both the Housing Code and Zoning Ordinance.

Zoning Ordinance §59-G-1.21(c) provides:

The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Petitioner failed to meet these burdens – he did not produce the evidence necessary to establish that the use would conform to the specific standards in the Zoning Ordinance, i.e., §59-G-2.00(b)(3) requiring that the owner receive compensation for only one dwelling unit and §59-G-2.00(a)(5)(ii), providing that an accessory apartment may not be approved if certain residential uses, such as a guest room for rent or a boardinghouse, exist on the property. In addition, the Petitioner failed to meet his burden of proof that repairs would be

made in conformance with DHCA's recommendations.

While the Technical Staff did recommend approval of the petition, its approval was conditioned upon compliance with the DHCA's recommendations. Technical Staff also made their approval contingent on the condition that the use conforms to the specific conditions of accessory apartment special exceptions set forth above. There is no evidence in this record that these requirements will be met. The Hearing Examiner finds that the DHCA Housing Code Inspector made reasonable efforts to contact the applicant to provide information on the repairs needed. After Petitioner failed to appear for the hearing, this office contacted him to provide an opportunity to submit additional evidence after the record had closed, without response.

The Hearing Examiner's conclusion amounts to a finding on the merits that Petitioner has failed to meet his burden in this case and therefore, the application should be denied.

III. RECOMMENDATION

For the foregoing reasons, I recommend that Petition No. S-2786 for a special exception to permit an accessory apartment located at 3937 Isbell Street, Silver Spring, Maryland, be DENIED.

Dated: March 2, 2011

Respectfully submitted,

Lynn A. Robeson
Hearing Examiner